BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Foreign Ownership Guidelines for FCC Common	)	IB Docket No. 05-55
Carrier and Aeronautical Radio Licenses	)	(DA 04-3610)

To: The International Bureau

COMMENTS ON PETITION FOR RECONSIDERATION

Leventhal Senter & Lerman PLLC ("LS&L") hereby submits these comments in response to the Public Notice issued by the International Bureau on February 11, 2005 (DA 05-384; hereinafter "Notice").[1] The Notice solicits comments on a Petition for Reconsideration filed in the above-captioned matter by the law firm of Wilkinson Barker Knauer LLP on December 17, 2004 (hereinafter "Petition").

A. Comments on the Petition

The Petition essentially addresses one particular aspect of the International Bureau's *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses,* released November 17, 2004 (DA 04-3610; hereinafter "Guidelines"). As summarized by the Petition at 13:

> The Bureau should therefore revise its *Guidelines* to reflect the Commission's practice of applying section 310 (b)(3) only to *direct* alien ownership of licensees and section 310 (b)(4) to all *indirect* ownership, regardless of whether the foreign investment is in a U.S. company that controls the licensee.

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[1] LS&L, a law firm concentrating in communications and media law, provides legal services to numerous Commission licensees as well as non-domestic entities with interests in such licensees.

Although, as the Commission recognized in *Voicestream Wireless Corporation*, 16 FCC Rcd 9779 at ¶38 (2001), there is some ambiguity in the interrelationship between the two subsections, the Petition makes a convincing argument that prior Commission rulings in this particular respect are at odds with the Guidelines. We particularly agree that the Guidelines should be modified in the manner requested by the Petition to "avoid the illogical result of imposing a stricter standard on non-controlling indirect investment than that applied to controlling indirect investments." (Petition at 13)

In addition, LS&L believes that the greater flexibility provided by the Petition's requested relief will provide public interest benefits by fostering additional sources of capital, more efficient corporate structures, less confusion in future transactions and, as a result, conservation of Commission resources.

B. Comments on Guidelines – Domestic Holding Companies

The Guidelines, in various places, assert that all indirect foreign ownership must be held through a *domestically organized* holding company. For example:

> The prohibition contained in Section 310(b)(3) also applies in situations where a foreign government, individual, or corporation holds equity or voting interests in a licensee through an intervening domestically organized holding company that itself holds *non-controlling* interests in the licensee." (Guidelines at 6; underscoring added).[2]
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> * * *
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> "By its express language, Section 310(b)(4), rather than Section 310(b)(3), applies in situations where the foreign entity holds equity or voting interests in a domestically organized holding company that directly or indirectly *controls* the licensee." (Guidelines at 7; underscoring added)

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[2] Compare Guidelines at 20, where any reference to a *domestically organized* holding company is omitted.

1. Section 310(b)(3)

Read literally, Section 310(b)(3) states that no more than one-fifth of the capital stock of a licensee company may be owned or voted by, among other things, "any corporation organized under the laws of a foreign country." Thus, clearly, to the extent a foreign individual holds 20% or less of the licensee company, Section 310(b)(3) does not bar such holdings even if they are held through a non-domestic corporation. And, there is nothing in the legislative history of the provision – or its predecessors – that would engender a contrary view. The Bureau's statements may be read to contradict this conclusion, although LS&L does not believe that was the Bureau's intention.

Accordingly, LS&L urges the Bureau to reaffirm its view of subsection (b)(3) to make clear that *compliant* foreign interests – those of 20% or less – may be held by foreign as well as domestic business entities, including but not limited to foreign corporations.[3]

2. Section 310(b)(4)

In contrast, Section 310(b)(4), by its terms, may be read as the Guidelines generally suggest with respect to the place of incorporation of companies in the ownership chain; that is, no broadcast, common carrier or aeronautical...radio station license may be held by:

> (b)...
> (4) any corporation directly or indirectly controlled by ...any corporation organized under the laws of a foreign country....

Even in this case, however, there is no reason to believe that Congress intended to preclude *U.S. entities* from using "off-shore" business formations as a means of investing

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[3] As to non-compliant foreign holdings (that is, those exceeding 20%), LS&L believes the analysis presented immediately below with respect to subsection (b)(4) should apply.

in, and holding, Commission licensee corporations – and nothing in the legislative history would support such a prohibition.

LS&L believes this is not only a reasonable interpretation of Congress' intent but one that can be supported by the express language of the statute. The prohibition in (b)(4) goes only to a licensee corporation *directly or indirectly controlled by* a non-domestic company; if the non-domestic company holds more than 50% of the licensee yet is merely a conduit of control exercised by a U.S. parent, the statutory prohibition itself would simply be inapplicable.

Accordingly, LS&L requests the Bureau to clarify its statements with respect to the notion that only *domestically organized* holding companies may be in the ownership chain of foreign individuals or companies in (b)(4) situations.

C. Comments on Guidelines - *Datran*

LS&L also agrees with the Bureau's analysis of the continuing import of *Data Transmission Co.*, 59 F.C.C. 2d 439 (1975):

> The Commission treats Section 310(b)(3) and 310(b)(4) restrictions separately and does not aggregate the foreign interests calculated under Section 310(b)(3) with foreign interests calculated under 310(b)(4). In other words, foreign investment in the licensee and foreign investment in the licensee's U.S. parent are not aggregated for purposes of calculating foreign ownership. (See Guidelines, Section G at 23)

To the same effect is the Bureau's conclusion in footnote * on page 9 of the Guidelines:

> Foreign ownership interests may be held in the licensee and the parent of the licensee at the same time.

In its 1975 holding in *Datran,* the full Commission recognized that Congress did not intend a "flow-through" effect such that ownership in the licensee should be aggregated with ownership in the parent to determine compliance with the statute. As a

matter of statutory construction, the Commission held that interests in both the licensee company and its parent – up to and including the respective statutory maximums of 20% and 25% respectively – were entirely permissible. The Petition, we note, does not contest this conclusion in any way.

Although the Guidelines (at 4) recite that the guidance being provided is specifically intended to govern only two classes of radio licenses under the Bureau's purview, it is obvious that as a matter of Commission construction of its enabling statute, the holding that Congress did not intend a "flow-through" effect with respect to (b)(3) and (b)(4) must, of necessity, apply to all Commission licenses subject to Section 310's ownership limits (including broadcast licenses). A statutory provision that does not distinguish between categories of persons on its face may not be construed to have different meanings with respect to such categories. *See, e.g., Clark v. Suarez Martinez*, 125 S. Ct. 716, 722-23 (decided January 12, 2005) (giving "same words a different meaning for each category would be to invent a statute rather than interpret one"); *Harris v. United States*, 536 U.S. 545, 556 (2002) (rejecting "a dynamic view of statutory interpretation").

D. Conclusion

For the foregoing reasons, LS&L requests that: (i) the Petition be favorably considered; (ii) the views expressed in the Guidelines concerning the *Datran* case be expanded to include all Commission licenses subject to Section 310(b), and (iii) the Bureau clarify its statements pertaining to domestically organized holding companies as set forth above.

Respectfully submitted,

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March 14, 2005

CERTIFICATE OF SERVICE

I, Sharon A. Krantzman, hereby certify that a copy of the foregoing "Comments on Petition for Reconsideration" was sent by first-class mail this 14th day of March, 2005, except as noted, to:

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